

R E M A R K S

518. e. 22
ON THE

T R I A L

OF

John-Peter Zenger,

P R I N T E R of the

NEW-YORK Weekly Journal,

Who was lately Try'd and Acquitted for

Printing and Publishing TWO LIBELS

Against the

Government of that P R O V I N C E.

L O N D O N:

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OF THE STATE OF NEW YORK

AND OF THE DISTRICT OF COLUMBIA

AND OF THE TERRITORIES

OF THE UNITED STATES

OF THE CITY OF NEW YORK

AND OF THE DISTRICT OF COLUMBIA

AND OF THE TERRITORIES



P R E F A C E.

TH E following *Remarks* were written by two Eminent Lawyers in one of our Colonies in *America*, immediately after the Publication of the *Trial* of Mr. *Zenger*, which it seems had been industriously spread over that Part of the World, before it reached *England*.

As the Doctrines contain'd in that Trial, or rather in the Speech of Mr. *Hamilton*, are of so new a Cast, and so absolutely contradictory to all the Resolutions and Judgments that have been settled and established for so many Ages, and by Judges of the highest Reputation, and most unquestionable Characters, for their Integrity, Virtues and Abilities, it could not be imagined so wild and idle an Harangue, could have had any Weight, or have met with any Reception here, where the Laws relating to Libels have been so often canvass'd, and are generally so well understood; and therefore the Person to whom these *Remarks* were sent, never thought of making any other Use of them than to satisfy his own Curiosity, and that of his Friends.

But seeing, to his great surprize, that this extraordinary Declamation has been mentioned with an air of Applause and Triumph in the Paper called *Common-Sense*, as striking out some new Lights with regard to the Doctrine of Libels; and upon the credit of that recommendation (as it is to be presum'd) the whole Trial, not only twice printed here, but retailed out in Scraps in the Publick News-Papers, whereby many well-meaning People may be deceiv'd and led into wrong Notions concerning the Laws of their Country in this Point: He has thought fit to communicate these Remarks to the Publick, in order to remove any Mistakes or Errors that Persons may fall into for want of an adequate Judgment in these Matters; and the rather, because if such false Opinions should happen to influence the Conduct or Practice of any, the Consequences may be very dangerous, it being an establish'd Maxim in our Law, that neither Ignorance nor Mistake, is an Excuse to any one who has broke it, from the Penalty of it.



REMARKS

REMARKS
ON THE
TRIAL
OF

JOHN PETER ZENGER, Printer.

SIR,

IT has been a common Remark among those who have observed upon the capricious Dispensations of Fortune, that great Events are often produced by Instruments that are not seemingly adequate; nay, that the same apparent Causes have quite contrary Effects; and the Road that leads one Man to Wealth, Honour, and Power, sometimes carries another to Poverty, Infamy and Ruin. Hence comes that confused Distribution of Axes and Coronets, Halters and Ribbons, which History displays by numerous shocking Examples; and thus it is, that Fate seems to play at Cross-purposes with Mankind; or to speak in Scripture-phrases, in this Sense as well as many others, *the Wisdom of this World is Foolishness*.

I find myself drawn into these grave Reflections, by reading the Trial of *John Peter Zenger*, at New-York, upon an *Information for Printing and Publishing a Libel*. This Piece, it seems has been lately printed there, and was put into my Hands, t'other Day, by a Friend who has both a general Acquaintance and a Correspondence with the Northern Colonies; as a rare Production, containing many Things new and surprising. And in Truth I must say it affords a lively Specimen, in Miniature, of the

Justness of the fore-going Remarks. I mean that Part of it which is attributed to *Andrew Hamilton*, Esq; of *Philadelphia*, *Barrister at Law*; together with the Sequel, describing the munificent Behavior of the Citizens in Common Council assembled, to the learned Gentleman, for his singular Performance on that Occasion.

I must at the same Time assure you, that if *Zenger's Trial* had been printed by Order of the Court that tried him, or from a Copy taken by a private Hand at the Trial, or by any other Means that excluded Mr. *Hamilton's* Approbation or Privity, I should have enjoy'd my own Opinion, without troubling you or any body else about it, and had the Charity to resolve all the Extravagancies that occur throughout his Declamation, into a right Discernment of the People he talk'd to, and a Dexterity in captivating them, which had its Effect in the acquittal of his Client. But when a Gentleman of the Bar takes the Pains to write over a long Discourse (he being the only Lawyer of either side who gave the Printer his Notes) in order to send it abroad through the World, as a Specimen of his Abilities, Sentiments and Principles; as a solemn Argument in the Law, fit to see the light and abide the Test in all Places; and,

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above

above all, as a Task of Duty, Zeng. Trial, which he thought himself P. 29, 31, bound to perform, even by going to the utmost Parts of the Land for the Purpose; and all this, without Fee or Reward, under the Weight of many Years and great Infirmities of Body: When a Barrister, I say, thus becomes a Volunteer for Error, and presumes to obtrude bad Law and false Reasoning upon the Sense of Mankind, because the sage Magistrates of New-York have put their Seal to it; I think my self at Liberty without using any other Apology, to exercise the judging Privilege of a Reader, since the Gentleman himself has put me into the Possession of it.

In doing this, I shall not in the least gratify a vain Itch of Writing, for there are no extraordinary Talents necessary for refuting gross Absurdities; but I shall have the honest Merit of endeavouring to undeceive such of my Fellow-Subjects in the Plantations as may, from the late uncommon Success of the Doctrine, mistake the Liberty of the Press for a Licence to write and publish infamous Things of their Superiours and of all others, at their Pleasure, provided they write and publish nothing but what is true. In the next place, I would preserve, as far as I am able, the Dignity of the Profession of the Law in these remote Parts of the British Dominions; and prevent its learned Professors in England, who probably will see the renowned Piece above mentioned (if we may judge from the industry used in dispersing it) from suspecting that all their American Brethren use the like Arts to gain Popularity and honourable Rewards. The former, having the Advantage of going daily to the great School of Law at Westminster, are already apt enough to think meanly of the Accomplishments of the latter who are far removed from Instruction; and their Opinion must be strongly confirmed in this Respect, if such a Rhapsody as was utter'd at New-York, should not only be applauded and rewarded publickly there, but printed and scatter'd in Reams through the other Colonies, without being followed by a suitable Animadversion.

Neither will it be amiss to take some Notice, in this Place, of the Quackery of the

Profession in general, without any particular Application, as it has been practised with vast Success in some of our Colonies. You will often see (if common Fame may be trusted) a self-sufficient enterprising Lawyer, compounded of something between a Politician and a Broker, who making the Foibles of the Inhabitants his Capital Study, and withal taking Advantage of the Weakness of his Judges, the Ignorance of some of his Brethren, the Modesty of others, and the honest Scruples of a third Sort (without having any of his own) becomes insensibly an Oracle in the Courts, and acquires by Degrees a kind of Dominion over the Minds as well as the Estates of the People. An Influence never to be obtained but by the Help of Qualities very different from Learning and Integrity. Wherever such a Man is found, the Wonder is not great, if from a long Habit of advancing what he pleases, and having it received for Law, he comes in Time to fancy that what he pleases to advance is really Law.

I have taken the Pains, during this short Vacation between our Monthly Courts, candidly to examine this new System of Libels lately composed and propagated on the Continent; the Discovery of which cost the good City of New-York, five Ounces and a half of Gold, p. 31, 32. a Scrip of Parchment, and three Latin Sentences. My intention is to consider Things, not Persons, having no other Knowledge of the Gentleman principally concern'd than what is deriv'd from the Paper now before me; and being wholly a Stranger to the Merit of those Disputes that gave Rise to the Prosecution of this Printer.

Much less shall I turn Advocate for any Lawless Power in Governors. God forbid I should be guilty of such a Prostitution, who know by Experience of what Stuff they are commonly made; the wrong Impressions they are apt to receive of themselves and others; their passions, prejudices and pursuits; tho' when all reasonable Allowances are made for certain Circumstances that attend their Mission from home and their Situation abroad, a considerate Person may be tempted to think --- it is well they are no worse than they are.

But

But to come to my Remarks on Zenger's Trial.

IN considering the Defence made for the Defendant (Mr. Zenger) by his Council (Mr. Hamilton) upon *not Guilty* pleaded to an *Information for printing and publishing a Libel*, it is not to the purpose to enquire how far the Matters charged in the *Information* are in their Nature Libellous, nor whether the *Innuendoes* are properly used to apply the Matters to Persons, Things and Places. It is only necessary to examine the Truth of this single Proposition, upon which the whole Defence is grounded, and to which the several parts of it refer; namely, *that the several matters charged in the Information, are not and cannot be libellous, because they are true in Fact.*

This is the Cardinal Point, upon which the learned Gentleman's whole Argument turns, and which he lays down over and over, as the p. 12, 13, first Principle that governs the Doctrine of Libels; and accordingly he confesses the printing and publishing of the Papers laid in the *Information*, and puts it upon the King's Council to prove the Facts contain'd in them to be false; alledging, at the same Time, that unless that were p. 15, 16. done, the Defendant could not be Guilty; but if the same were prov'd to be false, he would own the Papers containing them to be Libels. To this, it seems, the Attorney-General answered, *that a Negative is not to be proved*; and the other replied in these Words,

which I chuse to set down, p. 19. that I may not be thought to do him wrong. ----- *I did expect to hear that a Negative cannot be proved; but every body knows there are many Exceptions to that general Rule: For if a Man is charged with killing another, or stealing his Neighbour's Horse; if he is innocent in the one Case, he may prove the Man said to be killed to be still alive; and the Horse said to be stolen, never to have been out of his Master's Stable, &c. And this I think is proving a Negative.* Now I must think,

that it is strange a Gentleman of his Sagacity, who owns he was prepar'd for the Objection, could not yet hit upon some of these many Exceptions which every body knows. For he does no more than give two Instances of One Affirmative being destroy'd by another that infers a Negative of the first; at which Rate most Negatives may be proved, and then the old Rule may be discarded. Thus, if it is shewn that a Man is alive, it follows clearly that he was not kill'd; and if a Horse is proved to have been always in his Master's Stable (for this is what must be understood of his being never out of the Stable) it certainly follows that he could not be stolen. So that, according to this new Scheme of Proof, he who is accus'd of killing a Man, or stealing an Horse, is to be put upon proving that he did not kill or steal; because it is possible that such Proof may be had sometimes: And so in the principal Case, if a Question arises whether a certain Magistrate has done particular Acts of Injustice or not, the Method is to shew that he did not do such Acts, not that he did them. I have touch'd upon this, not for its importance, but as a Specimen of the learned Barrister's manner of reasoning, and of the Spirit with which he sets out from the beginning.

At length, however, he takes the *Onus probandi* upon himself, p. 18. and rather than the Thing should go un-prov'd, generously undertakes, at his Client's Peril, to prove the Matters charged in the *Information* as libellous, to be true. But I would be glad to know, by the way, how this undertaking Gentleman could have proved the Truth of divers Facts contained in the Paper which the Defendant published, supposing the Court had been so much over-seen as to let him into a Proof of this Sort. Could he prove, for Example, that Judges were arbitrarily displaced, and new Courts erected, in the Province of New-York, without Consent of the Legislature? For I am credibly inform'd, there never was a Pretence or Surmise of more than One Judge being displaced, or more than one Court erected under Mr. Cosby's Administration, both which happen'd upon one and the same Occasion.

Now I would not have this esteem'd a cap-
tious Exception, when I have to deal with
a Man of Law, who must or ought to know,
that if such a Justification as he offer'd were
at all allowable, it ought to be full and ex-
press, so as to leave no Room for a Libeller
to multiply and exaggerate Facts, at his Plea-
sure, when he is disposed to traduce Persons
in Authority; there being a manifest Differ-
ence between a single Act of Power with-
out or against Law (from which perhaps
few Governments have been free) and an
habitual Abuse of Power in repeated Instan-
ces of the same Species. I would further
ask, how he could prove *that the Law it
self was at an End, and that Trials by Ju-
ries were taken away when a Governor
pleased*; for if I mistake not, he was, at that
Time speaking to a Jury in a regular Court
of Law, and in a Prosecution which the
Governor had touch'd at Heart (as the Gentle-
man himself insinuates) and would have been
highly pleas'd to convict his Client, yet
would not attempt it but in the ordinary
Course of Trial by a Jury, and then too could
not find a Jury that would convict him. I
think I am warrant'd in putting these Que-
stions, even by the Authority of

p. 22. the Barrister himself, who says,
— *Truth ought to govern
the whole Affair of Libels, and yet the Party
accused runs risque enough even then; for if
he fails of proving every Tittle he has wrote,
and to the Satisfaction of the Court and Jury
too, he may find to his cost, &c.*

But for the present I will suppose Mr. Ha-
milton was able to prove all these Things;
nay, that the Jury knew them all to
be true. I will go farther and allow, that
Juries in Criminal Cases may determine both
Law and Fact when they are complicated,
if they will take such a Decision upon their
Consciences (which is almost the only Point
in which I can have the Honour of agree-
ing with him) yet after all these Con-
cessions, the main Question rests still between
us, *viz. Whether a Writing can be a Libel,
in legal Acceptation, if the matter contained
in it be true.* He is pleas'd indeed, to ex-
press his Dislike of infamous Papers, even
when they are true, if levell'd against pri-
vate Vices and Faults; and in

this Case he calls them *base*, p. 19, 20.
*unworthy, scandalous, un-
manly and unmannerly.* But surely it might
be expected, when a Point of Law was in
question, that he would have told us whe-
ther they were lawful or unlawful, inno-
cent or criminal, since these last are the on-
ly Epithets that were relative to his Subject,
tho' the first might have their Weight in a
Sermon or moral Essay. But it is plain, he
was aware of the Consequence of being ex-
plicit upon this Head; for had he own'd such
Writings to be lawful, because true, he
would have alarmed the Common Sense of
Mankind, by opening a Door for exposing
at Mercy, the Frailties, Vices, Defects and
Misfortunes of every Person high and low,
which must inevitably destroy the Peace of
Families, and beget ill Blood and Disorders.
If on the other hand, he had acknowledg'd
such Writings to be unlawful inasmuch as
they concern'd private Miscarriages and
Transactions; but that every Man might
write as much Truth as he pleas'd about
the Administration of the Government, not
only by pointing out Faults and Mistakes,
but by publishing his own Comment and
Inferences in Order to fill the Minds of the
People with all the Jealousies and Appre-
hensions his Imagination can form; it must
have shock'd Men of Understanding to be
thus told, that the Law had provided a-
gainst private Quarrels and Breaches of the
Peace occasion'd by virulent Writing; but
had taken no Care to prevent Sedition and
publick Disturbance arising from the same
Cause.

His Favourite Position, however, was to
be maintain'd at all Events; and there-
fore when the Chief Justice right-
ly instructed him, that he p. 16.
could not be admitted to give
the Truth of a Libel in Evidence, *that
the Law was clear that he could not justify
a Libel; for it is nevertheless a Libel that
it is true*; the discerning Gentleman was
pleas'd to understand by the Word *justify*,
*a Justification by Plea, as it is in the Case of
an Indictment for Murder, or an Assault and
Battery; there (says he) the Prisoner cannot
jus-*

justify, but plead not guilty; yet in Murder, he may prove it was in Defence of his Life, his House, &c. and in Assault and Battery, he may give in Evidence, that the other Party struck first, and in both these Cases he will be acquitted.

If the Party in either Case is acquitted, the Reason is I presume, because the Matter given in Evidence amounts to a Justification in Law of the Fact charged on him, and is equivalent to a Confession and Avoidance in pleading. In like manner, if Truth be a sufficient Justification of a Libel, the Defendant will be acquitted upon proving the Contents of his Paper to be true.

Now let it be observed, that the
p. 18. Words of the Book which the Chief Justice relied on are these.

—It is far from being a Justification of a Libel, that the Contents thereof are true—since the greater Appearance there is of Truth in any malicious Invektive, so much the more provoking it is. That this is good Law, I hope I shall be able to shew fully hereafter, as I shall shew, in the mean time, that it is an exprefs Authority against the well-read Barrister, who declares, *he has not in all his reading, met with an Authority*
p. 16. *that says, he cannot be admitted to give the Truth in Evidence,*
&c.

He seems to take it for granted (and I shall not dispute it with him now) that Matter of Justification cannot, in any Case, be pleaded specially to an Indictment of *Assault* or *Murder*; but the Party is to take Advantage of it in Evidence upon *not Guilty* pleaded. Let it be so; yet still this Matter must be a sufficient Justification, or the Party can have no Benefit from it any way. In an Action of Assault and Battery, where the *first Assault* must be pleaded specially; the Matter of Justification is just the same, as in an Indictment for the same Offence, where it must be given in Evidence upon the General Issue. I ask then, whether the *first Assault* is a Justification in an Indictment of Assault and Battery? If the Barrister should answer Negatively, such Answer is against all Sense, for the Party is acquitted by virtue of the Justification only. If he should

answer Affirmatively, he is inconsistent with himself, for he has but just affirm'd that when the Book says, *Truth is no Justification*, it must be understood of a Justification by Plea, by which he must mean that nothing else is a Justification but what is pleaded, or he must mean nothing at all. For the Words of the Book are, — *it is far from being a Justification*, &c. it is not said, — *you are far from being at Liberty to plead it in Bar*. In truth, the Author is not there speaking of the Forms and Rules of Proceedings upon Libels, but upon the Substance and Nature of the Crime; what shall and what shall not excuse or justify it. This is manifest from the Reason subjoined to support his Assertion, *viz. since the greater Appearance there is of Truth*, &c. which is a solid Reason grounded on the Wisdom of the Law, which punishes Libels even against private Persons, as Publick Offences, because they provoke Men to Acts of Revenge and Breaches of the Peace. I hope it will not be said that a Libel is less provoking, because the Truth of it is to be given in Evidence, than if it was to be pleaded in Bar.

But all this is *Star-Chamber-Doctrine* with the Barrister, and the very mention of that Court serves him for an Answer to every Thing, for which he has no other Answer; because the Memory of that Tribunal is justly detested on account of many illegal and exorbitant proceedings. No; this is the Authority of *Mr. Serjeant Hawkins* (tho' he uses Marginal References to some *Star-Chamber Cases*) whose Name is too great to receive any Addition from this Paper, and who after a long and studious Search in the Crown-Law, laid down this Proposition for Law at the Time he wrote his Book; and I believe it will appear in the Sequel that he was not mistaken. And now I come to join Issue with the Barrister upon this Point, whether *Mr. Serjeant* or he is in the right; or in other Words, whether Falsity in Fact be essential to a Libel, so that the Truth of the Fact may be given in Evidence to prove a Writing to be no Libel.

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He maintains the Affirmative of the Question, both from what he understands p. 16. to be the Authorities in the Case, and from the Reason of the Thing. All which shall be consider'd in their Order.

The Authorities cited by Mr. Hamilton to support the Proposition formerly stated consist principally of Four Cases, which I shall consider in the Order as they were produced.

The first is the Case of Zeng Trial, *John de Northampton*, 18 Ed. p. 16. III. 3 Inst. 174. which he observes does not appear to have been a Case upon an Information, but that he has good Grounds to say it was upon an Indictment. This is what I shall not contest with him, because it is not material, or indeed easy to be determin'd, without seeing the Record; tho' I conceive there are Grounds to say it was not upon an Indictment, as was the Case of *Adam de Ravenworth*, mentioned by Lord Coke in the same Chapter. The Case, however, stands thus; *John de Northampton*, an Attorney of the King's Bench wrote a Letter to one *Ferrers*, one of the King's Council, that neither Sir *William Scot* Chief Justice, nor his Fellows the King's Justices, nor their Clerks, any great Thing would do by the Commandment of our Lord the King, &c. which said *John* being called, confessed the Letter, &c. *Et quia prædictus Johannes cognovit dictam literam per se scriptam, Roberto de Ferrers, qui est de concilio Regis, quæ litera continet in se nullam veritatem: Prætextu cujus Dom. Rex erga Curiam, & Justiciarios suos habere posset indignationem, quod esset in scandalum Justic. & Curie. Ideo dictus Johannes committitur, &c.* Here says the Barrister, by this Judgment it appears the libellous Words were utterly false, and there the Falshood was the Crime, and is the Ground of the Judgment. For my own part, I can neither see Truth nor Falshood in the Words at the Time they were wrote, for they refer to a future Contingency that might or might not be as he said; and in this respect, they were the same as if the Man had said, the Roof of *Westminster-Hall* would fall up-

on Sir *William Scot* and his Fellows. Besides, the Words taken by themselves have no ill meaning; for I imagine it will be allowed that most of the great Things which Judges do, as Judges, are such as ought neither to be done nor left undone by the King's Commandment. Where then was the Offence? The Record, I think, shews that in the following Words; *prætextu cujus Dom. Rex erga Curiam & Justic. suos habere posset indignationem, &c. Ideo dictus Johannes committitur, &c.* It is observable, that the Author of this Letter was an Attorney of the Court, and by the Contents thereof he presumes to undertake for the Behaviour of the Judges in some great Matters that concerned their Office. The Letter was address'd to a Person who was of the King's Council and might possibly communicate the Contents of such a Letter to the King; the consequence of which might naturally be that. *Dom. Rex habere posset indignationem erga Curiam, &c.* for great Things were sometimes done, in those Days, by the King's Commandment; and the Judges, besides, held their Posts at Will and Pleasure.

The Words, *quæ litera continet in se nullam veritatem*, were therefore proper for the Judges to insert, in order to acquit themselves to the King; but they are no more the Ground of the Judgment than these other Words, *qui est de Concilio Regis*; both being only incidental Clauses that come in by way of Description: For it is not said; *Quia litera prædicta continet in se nullam veritatem*. After all, I would not have this Construction of the Case, plain and natural as it is, pass meely upon my own Credit; for I shall shew that this Case was so understood by one of the greatest Lawyers of his Time, before Lord Coke's 3d Inst. appear'd in the World.

21. Jac. B. R. *Tanfield v. Hiron*. Godb. 405, 6.

The Plaintiff brought an Action upon the Case against the Defendant, for delivering of a scandalous Writing to the Prince, &c. Noy for the Plaintiff cited, 18 Ed. III. a Letter was sent to *Ferrers*, one of the King's Coun-

Council, the Effect of which was, that Scot Chief Justice, and his Companions of the same Bench, would not do a vain Thing at the Command of the King; yet because he sent such a Letter to the King's Council, altho' he spake no Ill, yet because it might incense the King against the Judges, he was punished. If no Ill was said, will it be pretended that the Falshood of what was said could be a Reason for punishing a Man? Is it not ridiculous to say that the Falshood of innocent or insignificant Words can be Criminal? This Book, therefore follows the Record of Northampton's Case, and says; because it might incense the King against the Judges he was punish'd; which is almost a Translation of *prætextu cuius*, &c. which was the Ground of the Judgment, *Ideo Committitur*.

The next Case which the Barrister called to his Aid, is that of the Seven Bishops. *State Trials*, Vol. 4. and here he relies on a Flourish of one of the Council for the Bishops, and a dubious Expression of one of the Judges, separated from the rest of his Discourse.

Sir Robert Sawyer, 'tis true says, *Both the Falsity of it (the Libel) and that it was malicious and seditious, are all Matters of Fact, which they (the King's Council) have offer'd to the Jury no Proof of, &c.* This I must confess, proves one Point to which the Barrister adduced it, viz.

p. 17. *that he was not the first who insisted, that to make a Writing a Libel, it must be false.* And when I have allow'd this, I may almost venture to say, it is the only Point he does prove from the Beginning to the Ending of his long, elaborate Speech. Let me however, oppose to this the Reply of Sir Thomas Powis, in these Words; *whether a Libel be true or not, as to the Matter of Fact; was it ever yet permitted in any Court of Justice to be made a Question; or whether the Party be punishable for it? And therefore I wonder to hear these Gentlemen say, that because it is not a false one therefore it is not a Libel,* fol. 382.

Mr. Justice Powel also does say, *that to make it a Libel, it must be false; it must be*

malicious; and it must tend to Sedition. Upon which Words of this learned and worthy Judge, I would not presume to offer any Comment, except that which other Words of his own afford, that plainly shew in what Sense he then spoke. His subsequent Words are these; *they (the Bishops) tell his Majesty, it is not out of Averseness to pay all due Obedience; nor want of tenderness to their Dissenting Fellow-Subjects; but because they do conceive the Thing that was commanded them, was against the Law of the Land; they say, they apprehend the Declaration is illegal, because it is founded on a Dispensing Power; I do not remember in any Case in all our Law, that there is any such Power in the King; and the Case must turn upon that. In short, if there be no such Dispensing Power in the King, then that can be no Libel, which they presented to the King, which says that the Declaration, being founded upon such a pretended Power, is illegal.* So that the Judge put the whole upon that single Point, whether it be true that the King had such a Dispensing Power, or not; which is a Question of Law, and not of Fact; and accordingly the Judge appeals to his own Reading in the Law, not to Witnesses or other Testimony, for a Decision of it. In truth the Petition of the Bishops is not capable of having Falshood or Truth apply'd to it in any other Sense, there being nothing else affirm'd or deny'd in it, but that they thought they could not do what was commanded them because it was against the Law. This was the Behaviour; these were the Sentiments of that upright Judge, that gain'd him so much Honour among all good Men, as the Barrister takes Notice; not any Opinion of his, that the Contents of a Libel must be false in Fact, to make it a Libel; as he would unfairly insinuate.

Sir Samuel Barnardiston's Case p. 17. is the third that is touch'd upon; and here too the Gentleman finds nothing that can be strain'd to his Purpose, but the Defendant's Council insisting on the want of Proof to the Malice and seditious Intent of the Author. He seems to have forgot that the same Gentleman insisted also to have it proved, *that the Defendant was a Person* of

of a turbulent and unquiet Spirit, because these Words were set forth in the Information, and he takes no manner of Notice how all this was answer'd, which I must now do for him, in the Words of the Court; certainly the Law supplies the Proof, if the Thing it self speaks Malice and Seditious. As it is in Murder; we say always in the Indictment, he did it by the Instigation of the Devil: Can the Jury, if they find the Fact, find he did it not by such Instigation? No, that does necessarily attend the very Nature of such an Action or Thing. So in Informations for Offences of this Nature, we say, he did it falsely, maliciously, and seditiously, which are the formal Words; but if the Nature of the Thing be such as necessarily imports Malice, Reproach and Scandal to the Government, there needs no Proof but of the Fact done; the Law supplies the rest. How shall any Man prove another Person's Malice, which is a Thing that lies only in a Man's Mind? How should any Man know that I am malicious against the Government, but by my Actions? These Words, indeed, were pronounc'd by the Chief Justice Jefferies, who was then the Mouth of the Court, but tho' he was really an intemperate Judge (or a Mon-

p. 17. ster, as the Barrister, in his Bar-Language, delights to call him) yet I may safely refer it to all Men of Law, whether these Words could have discredited the best Mouth that ever spoke upon that Bench. State-Trials, vol. 3. 851.

An Instance of this Sort may not be impertinent, where a Chief Justice (who was no Monster) addresses himself to a Jury, that was trying a Libel, in this manner: I will not repeat the Particulars to you, only something to what the Defendant has said, that you may not be misled. He says, it does not appear that he did it maliciously or knowingly. There are some Things that you that are of the Jury are not to expect Evidence for, which it is impossible to know but by the Act it self. Malice is conceiv'd in the Heart, no Man knows it, unless he declares it: As in Murder, I have Malice to a Man; no Man knows it. I meet this Man and kill him; the Law calls this Malice. If a Man speak scandalous Words against a Man in his

Calling or Trade; he lays his Action, Malice; tho' he cannot prove it but by the Words themselves; you may see, there is Malice supposed to a private Person in that Slander, much more to the King and the State. State-Trials, vol. 2. 537.

Tutchin's Case, the Barrister does not properly cite, but endeavours to answer as a Case urged against him by the King's Council; and therefore I shall observe upon it in another Place.

But the Case of Cases is still behind, which he reserved for the last, to make the Point clearer on his p. 17. side, than all the rest put together could do. It is Fuller's Case. State-Trials, vol. 5. 445, 6, 7, 8. And it deserves notice, that altho' Fuller was charged with writing a Libel, yet that was not the Gift of the Information. He was, in truth, prosecuted for being a Cheat and Impostor, by Order of the House of Lords, as the King's Council declare in the Opening.

The Information accordingly sets forth, ' That W. F. intending the late King William ' and his Subjects to deceive, and to get ' several great Sums of Money fraudulently ' and deceitfully from the said King; concerning a Correspondency between divers Officers and Subjects of the said late ' King, and the late King James falsely pretended to be had; did write and Print a ' Libel, intituled, Original Letters, &c. ' with the Deposition of T. F. and T. F. Esqrs. proving the Corruption lately ' practised in this Nation; and the said W. F. afterwards did publish, utter, and for ' Truth affirm the said several false and scandalous Libels, without any lawful Authority; whereas in Truth the said T. F. did ' not depose upon his Oath as is contained in ' the said false and scandalous Libel; but ' the said scandalous Libels are false, feigned, ' and altogether contrary to Truth, &c.' Here it is manifest he was accused of a Cheat, in Forging the Correspondence and the Depositions just mentioned, with a Design of getting Money by his pretended Discovery. And hence it comes, that the Judge very properly asks him, have you any Witnesses? If you take upon you to write such Things as you are

are charged with, it lies upon you to prove them true, at your Peril. How come you to write those Books that are not true? If you have any Witnesses, produce them.

p. 17. *Thus said, and thus did that great Man, Lord Chief Justice Holt;* but not upon a Trial of the like kind with Mr. Zenger's, as his Council would have it thought. For in this Case the *Cheat* and the *Imposture* was the Offence, which consisted wholly in the falsity; that is, in affirming such Things for *Realities*, when they were nought but *Fictions*. On the contrary, had he been able to prove those *Letters* and those *Depositions* to be authentick, the discovery would have been valuable, and might intitle him perhaps to Favour and Protection instead of Punishment; however irregular he was in taking such a Method to publish Matters of that high Consequence. After this, let the learned Barrister, in all his Reading, shew an Information or Indictment for a *Libel*, where the *Falsity* is assigned in Form with an *ubi re vera*, as the Foundation of the Offence; which is done in *Fuller's Case*; and then I will acknowledge that the Questions put here by Lord Holt, would have been proper upon the Trial of his Client.

This is the Sum of the Barrister's Law-Cases. And is it not high Time to ask, whether such gross Misrepresentations of the Books can proceed from Ignorance or Disingenuity? Be that as it will; it might certainly be expected, that a Proposition advanced with so much Assurance, by a *Man of Years and Reading*, should have been supported by some One Authority in Point, rather than by a Series of low Prevarication and Quibble. Could he not find in all the Book-Cases and Trials at large concerning *Libels* (which are sufficient of themselves to make a large Volume) one Example of Proof being received to the Truth or Falsity contained in a libellous Writing? Indeed there is nothing like it to be found; tho' the Occasions have been many, where such Proof might be had, if it were proper; nay, where the Truth of the Thing was notorious to all Men, and yet no Question ever moved concerning it. This shall fully appear in the Sequel.

If any thing can be necessary further to expose Mr. Hamilton's Doctrine of *Libels* after answering his own Cases, it is only to subjoin some others that will shew how much he is mistaken in almost every thing he has offer'd on the Subject. I shall therefore mention a very few, that will bear a particular Application to his crude Notions, without entering into a Multitude of others, to tire the Reader.

16 Car. 2. The King v. Pym. 1 Sid. 219, B. R.

Pym was indicted at Exeter for a Libel, which he deliver'd to a Parson to be publish'd in Church there, and was to this Effect; *you are desired to bewail the Sodomitry, Wickedness, Whoredom, Lewdness, that is of late broken out in this formerly well-govern'd City; that God would turn their Hearts from committing those Wickednesses which go unpunished by the Magistrates.* Pym confess'd the Indictment, and was fined 100l. He afterwards brought a Writ of Error, and assign'd for Error that this was no Offence, because tho' he says, *go unpunished by the Magistrate*; yet he does not say that the Magistrate knew of it, and Wickedness unknown can't be punished. It was answer'd by the Court, that this contains matter of great Scandal to the Government of the City, for it makes the late Government better than the present, &c. *Hide, Twisden, Keelyng, Windham* Just.

I have pitch'd upon this Case, because the Barrister is fond of comparing the Plantations to large Corporations; and he will find here, that even those are not left to the Mercy of Li- Zeng. Trial, bellers, *altho' they do not put* p. 14. *in a Claim to the sacred Rights of Majesty*: And that a Misbehaviour of this kind to the Magistrates of a Corporation is not entirely innocent, *because it is not to be judged of, or* p. 14. *punished, as a like Undutifulness would be to our Sovereign.*

This Case was adjudged about four Years after the Restoration, when the Memory of the preceding Usurpation was fresh in every body's Mind. It is strange therefore Mr. Pym did not put himself on his Trial at Exeter,

ter, for it was evident beyond Contradiction to the People of that Age, from their own knowledge, as it is now to us from History, that the Wickedness specified in the Libel was restrain'd by a stricter Hand before, than after the Restoration. But this notorious Truth, it seems, did not avail Mr. Pym.

22 Car. 2. the King v. Saunders. Raym. 201. B. R.

Information for writing a scandalous Libel to H. Rich. who was indebted to him, and kept him out of his Money three Years by obtaining a Protection, and at length getting into the Prison of the King's Bench. Saunders wrote him a Letter, wherein he tells him; *that if he had any Honesty, Civility, Sobriety or Humanity, he would not deal so by him; and that he would one Day be damned, and be in Hell for his Cheating*; and cited several Places of Scripture to make good his Allegations. The Defendant was found Guilty, and moved in Arrest of Judgment, that the Substance of the Letter is not Scandalous, but impertinent and insignificant, &c. Cur. The Letter is provocative, and tends to the incensing Mr. Rich to break the Peace. The Court adjudged the Letter scandalous, and fin'd him 40 Marks. Keelyng, Twisden, Rainsford, Moreton, Inst.

I would entreat the clear-sighted Barrister to look carefully into the Words of this Libel, and try if he can discover any Truth or Falshood in them that was capable of Proof. And I must remark upon both these Cases, that tho' they were adjudged in the Reign of K. Charles II. yet neither of them was upon a State Prosecution, or at a Time when the Spirit of Plots and Factions had infested the Courts of Justice; but they remain unquestionable Authorities at this Day.

State-Trial vol. 5. The Case of Tutchin is strong against him; a Case adjudged since the Revolution, before that learn'd and upright Judge Sir John Holt, and plainly shews the Fallacy that runs throughout his whole Argument.

The Points insisted on by this Chief-Justice, in his Charge to the Jury, were these; *to say that corrupt Officers are appointed to administer Affairs is certainly a reflection on*

the Government. If People should not be called to an Account for possessing the People with an ill Opinion of the Government, no Government can subsist; now you are to consider, whether these Words I have read to you do not tend to beget an ill Opinion of the Administration of the Government; to tell us that those that are employ'd know nothing of the Matter, and those that do know are not employ'd. Men are not adapted to Offices, but Offices to Men, out of a particular Regard to their Interest, and not to their Fitness for the Places. This is the Purport of these Papers. If this was the Purport of the Papers, and so criminal as hath been just said, it is amazing surely that Mr. Tutchin did not offer to prove the Truth of these Allegations, and thereby take out their Sting! Could not he possibly think of as many corrupt or incompetent Officers, Ecclesiastical, Civil or Military in England prefer'd by Interest rather than Merit, as there were Judges displaced and Courts erected in New-York? Or if he was restrain'd by the hard-hearted Judge, from desporting himself in this pleasant and spacious Field; could he not apply to the private Knowledge which the Jurors (as well as the rest of Mankind) had of these Matters? For I imagine it will be allowed, that if no Instances of this sort could be shewn at the Time of Tutchin's Trial, it was the only Period within the Memory of Man, or the reach of History, that wanted the like.

But the misfortune was, the poor Man was not bless'd with such skilful Council as is to be had in Philadelphia, to think of these good things for him; otherwise you might have heard an alert Advocate (after returning thanks to his Lord- p. 18. ship for nothing) address himself to the Jury in this or the like eloquent Strain; *then, Gentlemen of the Jury, it is to you we must appeal for Witnesses to the Truth of the Facts we have offer'd, and are deny'd the Liberty to prove; the Law supposes you to be summon'd out of the Neighbourhood where the Fact is alledged to be committed; and the Reason of your being taken out of the Neighbourhood is, because you are suppos'd to have the best Knowledge of the Fact that is*

to be tried. And were you to find a Verdict against my Client, you must take upon you to say the Papers referr'd to in the Information, and which are proved to be written and published by us, are false, scandalous and seditious. You are Citizens of London, honest and lawful Men; and the Facts which we offer to prove were not committed in a Corner; they are notoriously known to be true. And as we are deny'd the Liberty of giving evidence to prove the truth of what we have published, I will beg leave to lay it down as a standing Rule in such Cases, that the suppressing of Evidence ought always to be taken for the strongest Evidence, and I hope it will have that Weight with you. Lay your hands upon your Hearts, Gentlemen, and recollect. Do none of you know; nay, do not all of you know certain Persons, who shall be nameless, that have been lately promoted by Favour and Interest, to Places of Trust and Profit both in Church and State, Army and Navy; whom you must know and believe in your Consciences to be ill Men and no way qualified for such Preferment; as my sagacious Client has most seasonably remonstrated to the Neighbours, by virtue of that right which every free-born Subject hath of publishing his Complaints, when the Matters so published can be supported with Truth? But is
p. 12, 21. Lord Holt asleep all this Time?

Can any reasonable Man, who has but common Notions of Judicature, imagine that this great Judge would suffer such Trash as this to be thrown out in any Court where he sat in Judgment? But what must he have said if the Libeller before him had offer'd to prove, that the Law itself was at an end; that Trials by Jury were taken away when a Minister pleas'd; that no Man could call any thing his own, or enjoy any Liberty longer than those in the Administration would condescend to let him do it? Would he have said that these Things did not tend to possess the People with an ill Opinion of the Government; and that Governments might well subsist, tho' Men should not be call'd to an Account for publishing the like? or would he have said, it was no matter what Opinion the People had of the Government, nor whether it subsisted

or not, provided these Assertions were true; and so have discharged the Man as a Publisher of precious and useful Truths to put the Neighbours on their Guard?

But here also the Barrister lays hold of a Random-Question, put by one of the King's Council to Mr. Montague, who was for the Defendant, and was then touching upon the Affairs of the Navy. Saith the former; will you say they are true? now the latter had hinted as much as that these Things were true; but did it with that Caution which a Man of Skill uses, when he would say something in Support of a lame Cause, but don't care to press an Impropriety too far. For that learned Gentleman was very sensible, that if he had presum'd to insist expressly on the Truth of the Matters contain'd in his Client's Papers, a severe Reprimand was the best thing that could have befallen him. His Words are these; nobody can say, that we never had any Mismanagements in the Royal Navy; and whenever that has happen'd, the Merchants of England in all Probability have suffer'd for it. But does the Judge, in his Charge to the Jury, vouchsafe to give this Matter any Answer, or so much as to mention it? Lord Holt did not usually pass by material Things that were offer'd in Defence of Persons tried before him; yet in this Case he makes no Question or Scruple about the Truth or Falshood of *Turchin's* Papers, altho' they contain'd many Things which his Lordship, the Jury, and all the World knew to be**** This candid Judge, however, puts the merits of the whole upon the Scandal of the Government, and the evil Tendency of such Writings. And therefore I must once more call upon the Northern Barrister to shew a single Instance where Witnesses have been produced by Council, and admitted by the Court to prove the Truth of a Libel. When he does this, it will deserve Consideration; but till then he may talk by the Hour without any Meaning.

I could mention some Cases of a more modern Date, that have been adjudged in *Westminster-Hall*, when this wild Doctrine was not so much as thought of, and when it would not have been altogether useless had

it been practicable; but I have chose to mention such only as are reported, that the Books may speak for themselves, and judge between us.

But this Lawyer seems to be above having his Points of Law decided by the Authorities of the Law; and has something in Reserve, which may serve to overthrow not only what has been offer'd in this Paper, but even all the Books of the Law. This is what he calls *the Reason of the thing*, but is truly and properly a Sketch of his own *Politics*; which leads me to shew that *the true Reason of the thing* here, agrees with the Law, and consequently both these are against this expert Master of Law and Reason.

The Reason of the Thing, as well as it can be collected from a Heap of Particulars huddled together without Order and Method, may be reduced to the three following Heads.

1. The Form of an Information for a Libel, and the Necessity of knowing the Truth or Falshood of its Contents, in order to direct the Judges in awarding arbitrary Punishment.

2. The Right every Man hath of publishing his Complaints, when the Matters so published can be supported with Truth.

3. The Necessity there is of using this Right, in the Plantations especially, by reason of the Difficulty of obtaining Redress against evil Governours by any other Means.

1. It will not be improper to premise, under the first Head, that a Gentleman of the Law, who takes upon him to pronounce so magisterially as the Northern Barrister has done concerning *Libels*, ought to have consider'd well the Nature and Extent of his Subject. It might be expected that he is not unknowing in any Part of Learning necessary to fix his Idea of a *Libel*. And yet the present Case would appear to be quite different. This learned Gentleman might have inform'd himself by reading some of the ancient Laws before the Conquest, that when the *Falsity* of virulent Writings and Speeches was taken into the Description of the Crime, there was a specifick Penalty annex'd, viz. *Cutting out the Offender's Tongue*, *Lamb. Sax. Laws*. But this Severity seems to have fallen into Disuse under the *Norman*

Kings; and accordingly *Bracton*, who wrote in the Reign of *Henry III.* gives a Description of these Offences as they were understood in his Days, wherein *Falsity* is neither express'd nor imply'd. These are his Words; *Fit autem injuria, non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus casus; verum cum ei Convitium dictum fuerit, vel de eo factum Carmen famosum & hujusmodi.* Fol. 155. Indeed here is no mention of *Libels against the King or the State*; the Reason of which seems plainly to be, that Offences of this Sort were considered as a Species of *Treason*, not only in that Age, but in several Ages after, notwithstanding the Statute 25 Ed. III. and tho' they have by happy Degrees dwindled into *Misdemeanours*, yet no body except the Barrister will say they are come to have a greater Indulgence from the Law, than the like Offences against private Persons. How far therefore *Bracton's* Acceptation of a *Libel* has prevailed ever since, must be submitted upon what has been offer'd in the preceding Part of the Remarks.

Here the Barrister throws in a shrewd Question, arising from the Form of the Information which charges the Libel to be false. *This Word FALSE*, says he, *must have some Meaning, else how came it there?* Zeng. Trial p. 15. *I hope Mr. Attorney will not say he put it there by Chance; and I am of Opinion his Information would not be good without it.* By way of Answer to this, I must take Leave to put a Question or two in the same Strain. Suppose a Man brings an Action of *Trespass*, for violating his Wife, and he fairly sets forth the Truth of the Case, viz. That the Defendant by *amorous Addresses, Letters, Presents, &c.* did gain the Consent of the Plaintiff's Wife, and at length debauched her. I would ask whether an Action of *Trespass* thus laid can be supported? I fancy not; and yet this is a more just Account of the Matter, than when *vi & armis*, viz. *Swords, Staves, Knives, &c.* are introduced as Instruments of invading this tender part of our Neighbour's Property. Suppose further, a Man kills another whom he never saw or heard of

of before; and he is accused of Murdering him of *Malice fore thought*. How come such Words to be put into an Indictment for a Fact so circumstanc'd? they must have some meaning; surely they are not put there by Chance; and I am of Opinion the Indictment would not be good without them. Why, there is this short Answer to be given to all these Childish Questions: There are many Words used in Pleadings of most kinds, sometimes for Aggravation, sometimes for Comprehension, often in Compliance with Antient Usage, which are not traversable, and many times are incapable of Proof. The Form of Indictments and Informations follows the Nature of the Fact, and sets it out in its worst Dress; and if the Fact is made appear to be unlawful, all the hard Names are supply'd by Implication of Law.

This is not all quoth the Counsellor; *it is said, that Truth makes a Libel the* p. 16. *more provoking; well, let us agree for once, that Truth is a greater Sin than Falshood: yet as the Offences are not equal, and as the Punishment is arbitrary; is it not absolutely necessary that they should know whether the Libel is true or false, that they may by that means be able to proportion the Punishment: for would it not be a sad Case, if the Judges, for want of a due Information, should chance to give as severe a Judgment against a Man for writing or publishing a Lye, as for writing or publishing a Truth?* Now is it not a sad Case, that he should want to be told, that Human Laws don't strictly regard the moral Pravity of Actions, but their Tendency to hurt the Community, whose Peace and Safety are their principal Objects; so that by this Standard only are Punishments measured. If this profound Sophister is of another Opinion, let him give a Reason why it should be a greater Crime in our Law, for a Man to counterfeit a silver Shilling than to cut his Father's Throat.

2. The right of remonstrating or publishing just Complaints, the Barrister thinks the Right of all Freemen: and so think I, provided such Remonstrances and Complaints are made in a lawful way. But when he comes to explain, it is not a Court of

Justice; it is not an House of Representatives, it is not a Legislature that is to be troubled (as he phrases it) with these Things. Who then, I pray, is to be troubled with them, for *the King* it seems is out of the Question? let the Barrister speak for himself; *they have a Right (says he)* p. 21. *publickly to remonstrate against the Abuses of Power, in the strongest Terms, to put their Neighbours upon their Guard, &c.* and in another Place, he speaks of it as a Hardship, *if a Man must be taken up as a Libeller, for telling his Sufferings to his Neighbour.* Now tho' I wish and hope as earnestly as he can do, that a free People may never want the Means of uttering their just Complaints, and of redressing their Wrongs too, when their Complaints are not heard; yet I always thought these Things were better understood than expressed in a Court of Law; and I shall probably remain in that Opinion, till the learned Gentleman can produce something from the *Common or Statute Law*, to shew that a *British* Subject has a Right of appealing publickly to his Neighbours (that is, to the Collective Body of the People) when he is injur'd in his Person, Rights or Possessions. When I am assur'd that he can do this, I promise him I shall not grudge a Voyage to that Country, *where Liberty is so well* p. 29. *understood and so freely enjoyed,* that I may receive the important Discovery from his own instructive Mouth.

I know the Law-Books assert the Right of Complaining to the *Magistrates and Courts of Justice*, to the *Parliament*, to the *King* himself; but a Right of Complaining to the *Neighbours* is what has not occur'd to me. After all, I would not be thought to derogate, by any thing I have said or shall say, from that noble Privilege of a free People, *the Liberty of the Press*. I think it the Bulwark of all other Liberty, and the surest Defence against Tyranny and Oppression. But still it is a Two-edg'd Weapon, capable of cutting both Ways, and is not therefore to be trusted in the Hands of every Discontented Fool or designing Knave. Men of Sense and Address (who alone deserve publick Attention) will ever

be able to convey proper Ideas to the People, in a Time of Danger, without running counter to all Order and Decency, or crying *Fire* and *Murder* thro' the Streets, if they chance to awake from a frightful Dream. But I must again urge, that these Points are not fit to be discuss'd in a Court of Justice, whose Jurisdiction is circumscribed by positive and known Laws. Besides, they take Place properly in a Sovereign State which has no Superior on Earth; and where an injured People can expect no Relief but from an Appeal to Heaven. This is far from being the Case of Colonies; and therefore I come to shew, under the third Head, that the Barrister's *Reason of the thing* is no other than *Reason inverted*, which possibly may help the Projects of a *Demagogue in America*, but can never be reconciled to the Sentiments of a Lawyer, or the Principles of a Patriot, consider'd as a Subject of *Great Britain*.

3. I have hitherto been taught to believe, that when a brave and free People have resorted to Measures unauthoris'd by the ordinary Course of the Laws; such Measures have been justified by the extraordinary Necessity of the Case, which excluded all other Means of Redress. And as far as I understand the Constitution, and have heard Accounts of the *British Colonies*, such a Case cannot well happen, and has never yet happen'd among them. But here the Barrister is ready to ask, how must we behave when we are oppressed by a Governour, in a Country where the Courts of Law are said to have no coercive Power over his Person, and where the Representatives of the People are, by his Intrigues, made Accomplices of his Iniquity? certainly it can't be a new Discovery to tell this Lawyer; that as the Governour is a Creature of the Crown, so the most natural and easy Course is to look up to the Hand that made him. And I imagine it may be affirm'd (without catching an Occasion of offering Incense to Majesty) that if one half of the Facts contained in *Zenger's Papers*, and vouched for true by his Council, had been fairly represented and proved at home, Mr. Corby would not have continued much longer in his Govern-

ment; and then the City of *New-York* might have applied to it self the Inscription of the Gold-Box; *demersæ p. 32. leges, timesacta libertas, hæ tandem emergunt*; with greater Propriety and Security, than could possibly be derived from the impetuous Harangue of any Lawyer whatsoever. I am the more embolden'd to say thus much, because tho' it is my Lot to dwell in a Colony, where *Liberty* has not always been well understood, at least not freely enjoy'd, yet I have known a Governour brought to Justice, within these last twenty years, who was not only supported by a Council and Assembly, besides a numerous Party here, but also by powerful Friends at home; all which Advantages were not able to screen him from Censure, Disgrace, and a Removal from the Trust he had abused.

It is not always necessary that particular Persons should leave their Affairs and Families in the Plantations, to prosecute a Governour in *Westminster-Hall*, unless their Fortunes are equal to the Expence. For it is seldom seen that the Violence of a bad Governour terminates in private Injuries; inasmuch as he can't find his Account in any Thing less than what is of a general and publick Nature. And when this is the Case, I hope none of our Colonies are, even at this time, so destitute, but that they can find the Means of making a regular Application to their Sovereign, either in Person or in his Courts at *Westminster*, as their Case may require.

But the wild Inconsistency that shines through most parts of this O-
rator's Speech; is peculiarly glaring p. 20.
in that part of it now before me. The Remedy which he says our Constitution prescribes for curing or preventing the Diseases of an evil Administration in the Colonies, I shall give in his own Words; *has it not been often seen (and I hope it will always be seen) that when the Representatives of a free People are, by just Representations or Remonstrances made sensible of the Sufferings of their Fellow-Subjects, by the Abuse of Power in the Hands of a Governour, they have declared (and loudly too) that they were not obli-*

lized by any Law to support a Governour who goes about to destroy a Province or Colony, &c. One would imagine, at first Sight, that this Man had the same Notion, with the rest of Mankind, of just Representations and Remonstrances to the Representatives of a free People, which has ever been understood to be by Way of Petition or Address directed and presented to them in Form; in which Case it is hoped, that they, being moved by the Complaints of the People

p. 21. will stretch forth their Arms to help them. But alas! we are all mistaken; for he tells us, in the same Breath, that the right Way is by telling our Sufferings to our Neighbours in Gazettes and News-Papers; for the Representatives are not to be troubled with every Injury done by a Governour; besides, they are sometimes in the Plot with the Governour, and the injured Party can have no Redress from their Hands; so that the first Complaint (instead of the last Resort) must be to the Neighbours, and so come about to the Representatives through that Channel.

Now I would be very glad to know, what the Neighbours can do towards effecting the desired Reformation, that will be attended with so good Success and so few ill Consequences, as a regular Application to his Majesty would be. It would be pleasant, doubtless, to hear this Politician speak out and explain himself at large upon this Subject. I confess it surpasses my Comprehension to conceive what the Neighbours inspired with weekly Revelations from the City Journalist, can do with their Governour and Assembly, unless it be to reform them by those persuasive Arguments which the Major vis never wants good Store of. If this be the Patriot's meaning, his Words may possibly be understood; but without this meaning they are meer *Far-gon*.

In a word; I shall agree with the Barrister (and so take my leave of him)
p. 29. that the Liberty of exposing and opposing arbitrary Power is the Right of a free People; and he ought at the same time to admit, That the Order of Things

and the Peace of Society, require that extraordinary Means should not be used for this Purpose, till the ordinary have failed in the Experiment. The supreme Magistrate of an independent Kingdom or State cannot always be controuled by the one, and then the other is justified by that Consideration. But in Colonies that are from their Creation subordinate to their Mother-Country, there is no Person who is not controulable by regular and well known Methods of proceeding; and consequently there can be no absolute Necessity of flying to Extremities, at least in the first Instance. From all which, I conceive, it follows, that local Considerations, upon which the Gentleman lays so great Stress, conclude directly against him; and I hope the Security which the British Constitution affords to every Man's Person, Property and Reputation, as well as to the publick Tranquillity, is not lessen'd by any Distance from the Fountain of Power and Justice; but that a Libel is a Libel, and punishable as such in America as well as in Europe.

I am sensible, there is a Freedom of Expression used in these Papers, of which I should disapprove in the common Cases of Controversy; but I found my self under a Necessity of shewing no Respect to the Performance under Consideration, unless I were to forfeit the little that might be due to the Remarks. For tho' a Lawyer is free, nay oblig'd by the Duty of his Profession, to make the most of the Cause he espouses, (his real Sentiments being suspended for that Time, by reason of the Bias under which he acts) yet when he draws his private Opinion into the Debate, and interests his Passions in the success of it, he then departs from his Character, and becomes a Party rather than an Advocate. In short, there is an Air of Self-sufficiency and Confidence mixt with the whole lump, enough to give a distrelsh even to good Sense and good Law, but is nauseous beyond all bearing, when neither of these is found. Among Lawyers, I was sure this Lawyer deserv'd no Answer, and yet an Answer seem'd indispensable, not only for the Reasons given at my setting out, but also in order to save

save many well meaning People from reverencing a piece of *Buffoonry*, that had been thrust into the World with so much florid Conceit and a Gold-Box tagg'd to the End of it. A piece, wherein the whole common-place of popular Declamation (equally adapted to all popular Occasions) is p. 27. exhausted, and *the Holy Scriptures* brought in to season his Jokes. But as this last seems design'd only for a Sally of *Wit* and *Humour*, I shall not offer to detract from its Merit; considering too it had so happy an Effect as to set the good People a laughing, when they heard *the Word of God* most ingeniously burlesqu'd in a *Christian Court*. A Piece that hardly shews the Author to have been serious when he pronounc'd it, or his wife Benefactors when they rewarded him; but that his solemn Professions of *Principle* and *Duty* compel a charitable Mind to suspect his Knowledge rather than his Sincerity, and *Citizens* are ever thought p. 31; 32. to be in earnest when they part with their *Gold* and shew their *Learning*.

Sir, I ought to make an Apology to you for trespassing so long upon your Patience, which might have been better employ'd; but I flatter my self with the Hopes of having some Allowance made for an honest, tho' weak Attempt to rescue the Profession of the Law, and the Interest of lawful Liberty from the Disgrace thrown upon both in One of our Sister Colonies. This is the Truth, and let it be my Excuse.

I am yours, &c.

Anglo-Americanus.

LETTER II.

SIR,

IT must be mortifying, no doubt, to a Person who has received peculiar Marks of Publick Approbation to be told, that the very Act which procur'd it was so far from being commendable, that it really deserved a severe Censure; and one wou'd the rather decline such an Office, how just soever the Occasion, because it cannot be done with-

out condemning at the same Time, the Judgment of those whose Suffrage had been thus unworthily obtain'd. But when the Laws are openly perverted, and Courts of Justice, with an Air of Gravity, droll'd out of their established Rules by such whose Profession supposes them Ministers of Justice, and when this too shall be dignify'd with Applause, and made highly meritorious; I conceive neither Good-nature, nor the Solemnity of *Publick Seals* shou'd restrain an honest Pen from exploding the Practice, in order as well to stop the Progress of its evil Effects, as to prevent the like Attempts for the future.

Virtue and Merit, it is most certain, ought to be encouraged, especially by all in Authority; but when that which is merely counterfeit shall gain Esteem, stand in the room of what is truly genuine, and be actually loaded with the Rewards thereof, it does not only frustrate the Original Intention of such Rewards, but likewise give Countenance to the Impostor, and furnish him with still further Means of vending his false Wares, in Prejudice of the Publick. Now this, with all due Submission, I take to be the Case of the Corporation in North America, with Regard to the Honours they were lately pleas'd to confer, on a noted Barrister in those Parts, for his supposed Services in the Affair of Zenger the Printer, whose Trial has been so plentifully dispers'd here, and in other Places. Aggregate Bodies, we find may be mistaken, and too often are, as well as private Men; and when they do err, it is of the more dangerous Consequence, on account of the Extent of their Power and Influence. The Province in general of New-York, or the City in particular might, for ought I know, have sufficient Cause of Complaint, in some Respects, against their then Commander in Chief and his Administration; but it is to be considered that as there never was one absolutely free from Faults, so it is the great Privilege of the Inhabitants of every British Government that a proper Channel is chalk'd out, in all such Events, and a Way open for Relief. The Method therefore which the Constitution prescribes ought to be

be strictly pursued, and any illegal Deviation is not only inconsistent and unjustifiable in it self, but has, besides, a Tendency to introduce Mischiefs more to be dreaded even than those that were sought to be redress'd. It is the Law which must be the Standard of Right and Wrong; and whoever has recourse to any other Aid, or knowingly advises thereto, in the Case of particular Grievances, cannot act on a true Principle of Publick Spirit, but must be influenced by unworthy Motives; and is always more or less an Enemy to the Community, according to his Situation, and in proportion to the Talents he happens to possess. If Mr. Zenger then will avowedly publish Seditious Libels against the Government under which he lives, and his Council will offer to support him by Artifices unbecoming the long Robe, and advancing Propositions manifestly contrary to Law; as the former deserves to be punished by it, so the latter I humbly presume to say, whatever he may claim from his Client, ought not to be paid his Wages by any Set of Men who owe their Being to the Law, and cannot exist without it.

But I shall not scruple to acknowledge here, and I do it on no superficial Observation, that there can't be a more pernicious Creature in a distant Colony than that of a Practitioner of the Law, with much Assurance, little Knowledge, and no Morals; a Character not unheard of in more than one of his Majesty's Plantations, and which yet I would by no means apply to Mr. Hamilton, any otherwise than may appear to be just from the Performance he has, it seems, taken so much Pains to publish to the World. The judicious Remarks already made upon it, by *Anglo-Americanus* will hardly leave room for any thing to be added that is very material, and therefore I shall content my self with a few *Gleanings* only, and make some cursory Reflections thereon, whilst they afford me an Opportunity of bearing my Testimony also against what I think the most indecent Behaviour at least, if it may not be called the boldest Outrage that ever was exhibited from the Bar without a suitable Chastisement.

Whoever has enquired into the Doctrine of *Libels*, and the Reason of their Punishment, will perceive, that they take their Degrees as they affect private Persons, particular Magistrates, or are aim'd against the Government it self; and I may venture to say, that no Lawyer of Reputation will deny but what is set forth in the Information against *John-Peter Zenger* was of this last Kind, and that too conceived in the grossest Terms, such as will not admit of a different Construction, or of any other meaning than what is put upon them by the Prosecutor for the Crown. Now I am sensible, that great Allowances are with good Reason made to Council in the Heat of Argument, and when supposed to be animated with a laudable Zeal for their Clients. Nor has it been usual to correct them for every harsh and hasty Expression, provided they keep within Bounds, and stick to that which is their Duty, without running into Matters that have no Relation to the Issue, and cannot fairly serve the Side they espouse. Yet, as the Lord Chancellor *Nottingham* occasionally said, *Council should not speak as if they would abet the Guilt of their Clients rather than advocate for their Innocency.* And since your ingenious Correspondent has clearly evinced, that the Truth of a Libel cannot be given in Evidence, that it is no Justification, on the general Issue, and consequently no proper Defence to a Charge of that Nature; (of all which Mr. *Hamilton* could not, or ought not to have been ignorant,) it is worthy of Consideration whether he did not involve himself in his Client's Crime, and partake of his Guilt, by declaring in the most publick Manner, that the Facts published in the News-Papers, and contained in the Information, were true, and offering to prove them to be so before a Court which had no Power to redress the Grievances complain'd of, 4 Co. 14. Hob. 166, 7.

Sir *Bartholomew Shower*, I remember in his Argument in the Case of the *King* against *Berchet & al.* asserts, that 'in all Cases of Contempts to a Court, no Pre-sentment is necessary, no not so much as to convict; for if done *in Facie Curie*, a
D Record

Record may be made of it, and a Punishment judicially inflicted, and that executed immediately, *Show. Rep.* 110. And agreeable hereto, we find that in a late Case of the King against *Thorogood*, *Trin* 9 *Geor. primi*, the Defendant having made an Affidavit in C. B. and appearing on Summons, confess'd that he made it, and that it was false; whereupon the Court recorded his Confession, and ordered that he should be taken into Custody and stand in the Pillory, &c. which was executed accordingly the last day of the Term. *Mod. Ca. in Law & Eq.* 179, 180. This is the more remarkable, because it was in the Court of Common-Pleas, which has ordinarily no Jurisdiction in Criminal Cases.—May it not from hence be infer'd (I hint it with a due saving to all the just Privileges of the Bar) that the Court at *New-York* might well have recorded some of the most seditious Expressions in Mr. *Hamilton's* Rhapsody, and committed him for the same, &c. ? If they had, I doubt the Blame must have center'd in himself, and his own Conduct; of which therefore he might then have had leisure to repent, as well as of his long Journey to so ill a Purpose.

But it will not be amiss perhaps for Example sake, to give an Instance of what has been done on the like Occasion with that before us; and to this End I shall cite a Case in the Court of King's Bench many Years after that of the Star-Chamber was at an end, and which in the Words of Sir *Thomas Raymond* was as followeth; ' *Memo-
randum*, June 18. 1680, Mr. *Nathaniel Reading* having been convicted (before Justices of Oyer and Terminer by virtue of a Special Commission) for endeavouring to persuade *Bedlow*, who was a Witness against the Noblemen imprison'd in the Tower of London, to forbear his Prosecution of them; and he the said Mr. *Reading* having had Judgment executed upon him by being set in the Pillory, and fin'd 1000 l. and imprison'd for the same, but his Fine since pardon'd by the King, came this day into Court, and demanded that an Information which he there brought in his Hand might be

received by Mr. *Astrey* against the Commissioners who condemn'd him, of which my Brother *Jones* and Brother *Dolben* were two, and that the Information may be filed. But the Court did declare that he was in the wrong way to exhibit any Information in this manner, and did caule his Words, whereby he did accuse the two Judges of Oppression, to be recorded; and for these Words, and for that he was infamous by having been on the Pillory, the Gentlemen at the Bar did pray that his Gown might be pull'd over his Ears, he having been formerly a Practiser at the Bar, which was ordered and executed in Court; and he was also condemn'd in Court to pay the King 500 l. and to lie in Prison till he paid it, *Raym. Rep.* 376.

The Trial of this Gentleman refer'd to here, may be seen in the State Trials, vol. 2 p. 253. on which Occasion the Lord Chief-Justice *North* made a Speech aggravating the Defendant's Offence as he was a Council, one who ought to be a Man of Knowledge, and a Minister of Justice to assist the Court wherein he pleaded. He said he thought the Court ought to shew a more than ordinary Severity against such an one; and that 'tis a great Credit and Benefit to the Profession, that the Members of it for such Offences should be dealt with more Severity than we should deal in other Cases. *Id.* p. 374, 5. Far be it from me to make any invidious Comparison here betwixt the present Practiser in *Pensylvania* and the quondam one in *Westminster-Hall*, tho' they are both celebrated, the one in the Trial of Mr. *Zenger*, and the other in his own. It may however be noted that the latter was said to be artful, and affectedly eloquent, and to have strove to lead the Judges out of the Way, while he was told by the Chief-Justice that his Defence was artificial, because it was nothing to the purpose; and by another of the Judges, that he disgrac'd his Profession by making so weak a Defence. But without adverting to any particular Beauties in the modern Performance, this is certain that Counsellor *Reading* lost the Bar-Gown by his Art, and Counsellor *Hamilton* got a Gold-Box of five Ounces, with the

the Freedom of the City of New-York by his. A pregnant Instance of the Capriciousness of Fate, and of the Justness of your late Correspondent's Observation at the Entrance to his excellent Remarks!

The Gentlemen of the Bar (as indeed it might well be expected from their Education, and the Nature of their Business) have been remarkable for observing the Regard that is due to all in Authority with the utmost Delicacy; and in Return, have always been us'd with suitable Respect. But that the Lawyer of Philadelphia may see the Courts of Justice in former Ages, as well as of late Years, did not spare the unruly Members of the Profession, any more than others, for much less faulty Behaviour than that of the leading Counsel in Zenger's Trial, I will refer him to a Case which happen'd Mich. 13 Eliz. Rot. 39, when Henry Blaunderford a Counsellor at Law was committed to the Fleet, and fin'd for falsely reporting the Opinion of the Lord Leicester, and Secretary Cecil with these Words, *Humanum est errare*. And that even Noblemen met with the like Treatment, on such Occasions, will appear from the Case of the Lord Stourton, who, 19 Hen. VIII. was committed by the Court, and fin'd for saying these Words, *I am sorry to see Rhetorick rule where Law should*.

Before I proceed, I will mention one Case more, purely to shew how dangerous it is to afford any unlawful Helps to Persons on their Trials in Criminal Prosecutions, even tho' it be meerly by way of private Instructions, when such Instructions are to be publicly made use of, and import Scandal to the Government. It is the Case of the King against Aaron Smith, Mich. 35 Car. 2. in B. R. 'This Term (says the Book which has the Allowance of all the Judges) Aaron Smith was brought into Court, being formerly convicted on a Trial at Bar for delivering to Stephen College, being upon his Trial at Oxford for High Treason, a Paper of Instructions, full of scandalous Reflections upon the King and Government; as that they might as well have hang'd him at Tyburn as he came by, as brought him thither, only to murder him with a little

more Formality. For which the Court gave Judgment that he should pay a Fine of 500 l. stand upon the Pillory twice, and be of the good Behaviour for a Twelve-month, *Skin. Rep.* 124. I shall only observe this Case was upon an *Information*, so much inveigh'd against by Zenger's Counsel, and yet I never heard it censur'd at all, as was that of poor College, I own, with too good Reason.

It is now time to take notice, that there is, amidst a heap of Jargon and Absurdities, one obvious Mistake which runs throughout Mr. Hamilton's ostentatious Harangue, and that is in Relation to the Court of Star-Chamber. He wou'd suggest that because that Court was abolished by Act of Parliament, on account of some insufferable Abuses that had crept into it, all the Cases that had been adjudged there, on Informations for Libels, were consequently of no Authority. Whereas the Judgments given there, in Matters properly cognizable before them, which Libelling especially was, are allowed to be good Law at this Day, and are constantly quoted, as such, in the Court of King's Bench. Indeed it is said that the Reason of disallowing the Star-Chamber-Court, was because their Authority was before and now is in B. R. and consequently that Court unnecessary, *Comb.* 36. So the Lord Chief Justice Holt declared that B. R. possess all the Lawful Power the Star-Chamber had, *Id.* 142. And that the Court of Star-Chamber was taken away, because the Crimes were punishable here, *5. Mod.* 464; which is likewise intimated by the Statute itself. Now tho' I am as well satisfied, perhaps, with the taking away of the Court of Star-Chamber, considering the Occasion that had been given, as our Northern Barrister can possibly be, and shou'd equally rejoice, I hope, at the redressing any other publick Grievance; yet I cannot, with him, condemn by the Lump, and argue that because that Court did some things amiss, therefore it did nothing right. At this rate, every Court that had or has a Being may be in Danger of the same Epithets he loves to bestow on that we are speaking of; and it may as well be suppos'd

that because a certain Set of Citizens not unknown to Mr. *Hamilton*, lately did a very *fill* thing, they therefore never did a *wise* one. For which Reason I presume it will not be altogether impertinent to produce the Sentiments of that Oracle of the Law, Sir *Edward Coke*, concerning the Court of Star-Chamber. 'It is (*says he*) the most Honourable Court, our Parliament excepted, that is in the Christian World, both in Respect of the Judges, and of their Honourable Proceedings according to their just Jurisdiction, and the ancient and just Orders of the Court. For the Judges of the same are, the Grantees of the Realm, the Lord Chancellor, the Lord Treasurer, the Lord President of the King's Council, the Lord Privy Seal, all the Lords Spiritual and Temporal, and others of the King's most Honourable Privy Council, and the Principal Judges of the Realm, and such other Lords of Parliament as the King shall name. And they Judge upon Confession, or Deposition of Witnesses. And the Court cannot sit for hearing of Causes under the Number of eight at the least. And it is truly said, *Curia Camera Stellata, si vestustatem spectemus, est antiquissima, si dignitatem, honoratissima*. This Court, the Right Institution and ancient Orders thereof being observed, doth keep all 'England in quiet.' Confor-

4th *Inst.* mable hereto, a late learned
p. 64. Writer who was advanced to the highest Post in the Law in a Neighbouring Kingdom to that of our Mother Country, and wherein he dy'd, has a Paragraph, which I believe will give us a truer Account of the Court it self, and the Abolishment of it than what is to be learnt from our Barrister's Speech at *New-York*, and therefore I will insert it here. * 'The Court of Star-Chamber whilst kept within due Bounds, was certainly of the greatest Use to preserve the Peace and Security of the Kingdom; and perhaps was the only Court which by its ordinary and proper

' Jurisdiction, cou'd effectually prevent and punish Riots, Perjuries and other Misdemeanors of the highest Nature. But being made use of by the Court to support Proclamations and Orders of State, and to vindicate illegal Commissions and Monopolies, that Extension of their Power became a Grievance insupportable, and the Nation was never easy till that Court was entirely suppress'd by Act of Parliament. *The House of Commons* were so eager in their Zeal to destroy what they call'd a Court of Inquisition, that tho' the Bill was of so great Consequence, yet they sent it up to the Lords, with only once reading it, and without its being ever committed, which was a Thing, perhaps never before heard of in Parliament. *Cl. V. 1. 223.*

I need only add on this Head that the Crime of *Libelling* is the same now, as it was while the Court of the Star-Chamber subsisted, and the Nature of the Offence the same then, as now; a Crime that must necessarily be punished as long as there are States and Communities established in the World. And our assuming Barrister will not find an Author that treats of the Crown Law since the Statute of 16 *Ch. 1. Ch. 10.* any more than before, but makes use of the Cases adjudged in the Star-Chamber generally as good Law, and of equal Authority in those Matters with such as were afterwards adjudged in the King's Bench. Some indeed are justly liable to Exception in the former, as we have also known too many in the latter, particularly during the next succeeding Reign of *Ch. II.* none whereof are, however, God be praised, to be met with, or heard of since the glorious and happy Revolution in 1688, which I trust has for ever excluded all Partiality and Oppression from *Westminster-Hall*.

But the learned Lawyer of *Philadelphia* declares, that he has not in all his reading met with an Authority that says we cannot be admitted to give the Truth in Evidence upon an Information for a Libel. I don't know what this Gentleman's reading may be; but if he had read some of the Cases

* *Disc. concerning Treasons and Bills of Attaind.* p. 94. Printed Anno 1716.

Cases above-mentioned which could not well escape him, it might reasonably have been expected he would have taken Warning, been a little more cautious, and not have ventur'd to incur the Penalties which others before him had so justly suffer'd. By *all his Reading*, he would insinuate, I suppose, that he had *read all*; and if that were true, it might well be thought he had read to very little Purpose, who could make so ill an Use of it, or think it a *Duty on him to go to the utmost Parts of the Land*, to propagate Doctrines and Principles diametrically opposite to, and just the Reverse of what he must have read. We shall soon discover that the Barrister's Reading is not quite so extensive as he would have it imagin'd. But it is previously to be observed, that if there were no such Authority *in terminis* as that he calls for, a Man who reads with any tolerable Understanding would of course infer the same Thing, when all the Books on the Subject of Libels lay it down as a Rule, which they unanimously do, *that it is not material whether the Libel be true or false*. For if that be not material, to what End should the Truth be offer'd in Evidence? Or, how should it be rejected before it was offer'd, which undoubtedly is the Reason that there have been no late Instances of that Sort. It might suffice therefore to undertake as often as this well-read Lawyer produced a Precedent of its being demanded from the Bar to give Evidence of the Truth of a Libel, to shew that it was as often deny'd by the Court. And tho' I admit it has been attempted before, on Trials for Libels of the leis enormous Kinds, yet he is probably the only one that has done it in any Case within these hundred Years. However, if we would find an Instance of that Sort, we must necessarily have Recourse to the Proceedings of the Court where that Crime was usually punished. The *Star-Chamber Reports* then may satisfy Mr. Hamilton, that *Term Pasc. 7. Car. 1.* there was the Case of *Coston*, Gent. v. *Hitcham Mil. Servient. ad legem*, as follows. 'The Defendant, the Morning before he went to the Sessions, being a Justice of the Peace, received

' scandalous and libellous Articles against the Plaintiff, carry'd them to the Sessions in his Pocket, and in open Court, in disgrace of the Plaintiff, pull'd them out and said, you shall see what a lewd Fellow this is, and not fit to speak in this Place, and then caus'd the said libellous Articles to be read in the publick Sessions. And the Plaintiff then desiring a Copy of them, and to be tried upon them, the Witnesses to prove them being noted in the Margin, the Defendant did not suffer him to have a Copy, or to be tried thereupon, nor took any Course that he might at the next Sessions, or at any Time after be questioned for them, but took the Articles again out of the Sessions and carried them away. And after, further to disgrace the Plaintiff in his Practice (being an Attorney) sent the said Articles to Mr. Justice Harvey, at the Reference of a Cause to him, which *Coston* attended; and a Jury having given a Verdict against the Defendant, he sent for the Jurors and question'd them about their Verdict, and told them they were a Company of Fools, and that if there had been but one wise Man among them their Verdict had not been so. And for these Offences he was committed to the *Fleet* and fined 200 *l.* In this Cause the Defendant would have had Witnesses to prove the Matter of the said scandalous Articles to be true, but that was disallowed by the Court. *Russ. Col. vol. 3. p. 36, in Append.* This I presume the Barrister, when he is serious, will allow to be in Point, tho' it happen'd not to fall in the way of his Reading. He cannot object surely, that it does not appear to be on an Information preferr'd by the Attorney General, since it is a much stronger Case than if it had. For if the Court would not receive such Evidence in a Cause depending on the Complaint of a petty Solicitor for being libell'd, and this too preferr'd against a Justice of Peace, a Knight, and a Serjeant at Law; *a fortiori*, they would never admit it on an Information exhibited by his Majesty's Attorney General, against a private Person for libelling the Government.

There

There was also as I have learnt divers Years before, viz. *Mith. 2 Jac.* the Case of *Peter Brereton* Clerk, for writing a scandalous Letter to *Loyd Register* of the Bishop of *St. Asaph*, and sent to himself, who was therein charg'd with Bribery and Extortion in his Office; for which libellous Letter the Defendant was sentenc'd, tho' as the Book has it; *he would have undertaken to prove the Contents of the Letter to be true.* Here then are two Precedents of what the Barrister himself had never met with in all his Reading; the one in a Case for libelling a practising Attorney, and the other of the Register of a Bishop's Court; but I believe I may defy this Gentleman, if he were to read as many more Years as he has done, to produce a *third*, where the Offence under Prosecution, being of the highest Degree, and levell'd at the Government, like that for which he was so zealous an Advocate, the Council for the Defendant dar'd to offer Evidence of the truth of it. On the contrary, if he had dipt into the Lord Chief Justice *Keelyng's* Reports, fol. 23 (before he left his Chambers) he would have there found it resolved by the whole Court, that *tho' a Counsellor at Law may plead his Client's Cause against the King, yet if under Colour of that, he takes upon him to vent Sedition, he is to be punished.*

It is no wonder indeed if our Barrister should be unapprized of *Brereton's* Case, it not being (at least to my knowledge) in Print; and you perceive I was under no necessity of mentioning it, being before provided with an Authority to my purpose. But it is reported as above in * *Sir Thomas Mallet's* MS. Treatise of the Court of Star-Chamber, a Copy whereof has fallen into my Hands by the favour of a Friend. And since I have named this Work, I shall with his leave, take a Paragraph out of it, which I am persuaded will not be deemed unsuitable to the present Debate, after hinting that the Book seems to be wrote in the time of *James I.* when the Doctrine now revived, and so tenaciously advanced by *Mr. Hamilton* is said to have been long before exploded as a gross Error. 'There

' are (*says Sir Thomas*) two gross Errors
' crept into the World concerning Libels;
' the one, that it is no Libel if the Party
' put his hand unto it, and the other that
' it is not a Libel if it be true; both which
' have been long since exploded out of this
' Court. For the first, the Cause why the
' Law punisheth Libels, is for that they tend
' to raise the Breach of the Peace, which may
' as well be done, and more easily when
' the Hand is subscribed, than when it is
' not. And for the other, it hath been e-
' ver agreed, that it is not the Matter but
' the Manner which is punishable. For li-
' belling against a common Strumpet is as
' great an Offence, as against an honest
' Woman, and perhaps more dangerous to
' the Breach of the Peace; for as the Wo-
' man said, she should never grieve to be
' told of her red Nose if she had not one
' indeed. Neither is it a Ground to exa-
' mine the Truth or Falshood of a Libel,
' because it is *sub Judice*, whether it be a
' Libel or not; for that takes away *Sub-*
' *jectum Quæstionis*, and determines it to be
' no Libel by admitting the Defendant to
' prove the Truth, and the Defendant in
' that Case ought to plead a Justification
' and Demur in Law. But if he plead not
' Guilty, the Question is gone whether it
' be a Libel or not.' Thus according to
this Author's Opinion, who, if I mistake
not, was one of the Justices of the Court
of King's Bench in his Time, *Mr. Hamilton*,
could he really have persuaded himself that
the Matter charged in the Information were
not Libellous, as he *insists they are not*,
would have discovered more Accuracy in
his Profession, as well as Candour in his
Practice, by advising his Client to *Demur*
to it, whereby he would have admitted no
more than what was avowed at the Trial
on the general Issue. Then indeed it would
have fairly come before the Court to be
considered whether the Papers were libellous
or not, and he as Council for the Defen-
dant might regularly have been heard to it.

He would then have been at liberty to
exert his uncommon Talents, manifest his
extraordinary Reading, his superiour Genius
and great Skill in Language, and in explain-
ing,

ing the true import of Words, without so directly flying in the Face of every Authority, and opposing all the Cases that ever were adjudged concerning *Libels* before he was born and since. But alas! That would not have answered the Intention of our eloquent Barrister. He would not then have had it in his power to use his Arts, and play his Game with a dozen honest Men of as good natural understandings perhaps, tho' not of equal Experience and Cunning with himself. If he had gone that way to work, he would have had no chance for the Prize. Vain had been his Expedition, and lost, entirely lost, all his Labour. In a word, if the Learning and Integrity of the Bar only were required, he might as well have stayed at home, where, if I am rightly inform'd, there are Instances in abundance of the blessed effects of Mr. *Hamilton's* well-known Principles.

This sagacious Gentleman *begs leave to observe, that Informations for Libels is a Child, if not born, yet nursed up and brought to full Maturity in the Court of Star-Chamber*: But what is particularly to be infer'd from this shrewd Observation, he does not at present tell us. If the Star-Chamber was the Court where Crimes of this Nature were generally punished, according to its ordinary and proper Jurisdiction, as it certainly was, how should it be otherwise than that Informations for Libels must be met with there? And considering the Antiquity of that Court, 'tis more than probable the Crime was first prosecuted and punished in it. But what then? Is the Legitimacy of the Child (if I may be allowed to carry on the Metaphor) therefore to be called in question? Or its Education the less honourable? I might put our witty Barrister in mind, that what I have mention'd is the very Reason why the *spurious Brat* he is so fond of, which was never brought to full Maturity, nor ever will, first appeared in the Star-Chamber, tho' it has not been heard of since in any other Court till very lately at *New-York*; I mean that of making Falshood to be essential to a Libel, and claiming a Right to give Evidence of the Truth of it by way of Justification.

He must however intend by the foregoing Passage to impeach the Legality of Informations *qua* such (which by some Words that drop from him many Pages after, would seem to be what he aims at) or as they relate only to *Libels*; and in either Case he will again betray the Scantiness of his Reading and Knowledge in the Law. As to Informations In general, it has been incontestably prov'd that this Method of Proceeding is *no way contrariant to any fundamental Rule of Law, but agreeable to it*. That it was the *constant Usage, and had the Approbation of the Judges and Lawyers of all Ages, and in all Reigns*, Show. Rep. 106, to 125. And in the Case of the Information against Seventy poor Persons for a Riot in pulling down Fences, &c. 2 *W. & M.* (which probably may be the same) it was said by Lord Chief Justice *Holt*, that 'the Lord Chief Justice *Hales* complain'd of the Abuse of Informations, but not that they were unlawful; ---- That he shou'd not come now and impeach the Judgment of all his Predecessors; ---- That the Star-Chamber was not set up by the Statute (*Hen. 7.* but was as Common-Law, and Informations were accordingly brought in that Court and others. And the whole Court were of Opinion that Informations lay at common Law, 5 *Mod.* 463, 4.' Now this I take to be as good an Authority as the extrajudicial Opinions of those anonymous *Great Men* who Mr. *Hamilton* says, have boldly asserted that the Mode of Prosecution by Information is a National Grievance and greatly inconsistent with the Freedom which the Subjects of England enjoy in most other Cases; nor can one forbear observing, *en passant*, that he seems much more dispos'd, where there is no Danger at least, to follow the Example of bold than of wise and judicious Men.

This then being a Legal Course of Proceeding in Criminal Cases, and for all publick Offences, it must undeniably be as proper in the Case of Libels as in any others. And Sir *B. Shower* in reckoning up the several Crimes that were cognizable in the Court of *Star-Chamber*, includes *Libels* among

mong the rest, for which he says, *There were always Informations in the Star-Chamber and King's-Bench.* Show. 119. I am the more free in borrowing what I do from that eminent Practiser, on the Subject of Informations, because he had studied it well, and taken more than usual Pains therein; and as the Judgment afterwards given by the Court of King's Bench was pursuant thereto, so it seems to have put a Period in *Westminster-Hall*, to all Cavils against that Mode of Prosecution.

If the Barrister means notwithstanding to suggest moreover, that Informations for Libels are but of modern Date, or little longer Standing than about the Time of the Expiration of that Court, where he supposes they had their Origine, let him be further refuted by the above mentioned Sir *Thomas Mallet*, who wrote professedly on the Court of *Star-Chamber*, and may be supposed to be pretty well acquainted with his Subject. He tells us, that * ' In all Ages Libels have been severely punished in this Court, but most specially when they began to grow frequent about 42 and 43 *Eliz.* when Sir *Edward Coke* was her Attorney General.' And, treating of the Antiquity of that Court, he makes it very probable, that † *It was the most ancient of any Court of Justice, and the Mother-Court of the Kingdom*; wherein he does not differ from Sir *Edward* himself, in his 4th *Inst.* 64, already quoted. Now 'twas while this consummate Lawyer, it seems, was Attorney General to the renowned Queen *Elizabeth*, that Informations for Libels began to be most frequent, or in Mr. *Hamilton's* elegant Stile, when *the Child was brought to full Maturity*: And it is readily submitted to all who are vers'd in our History and Constitution, whether that Period will be any Disparagement to the Offspring.

But if Informations for Libels in particular were one of the Grievances of that Court, nay the chief, as the Barrister would labour to make his Hearers believe, how came

* *Treatise of the Court of Star-Chamber*, ubi supra.

† *Id.* 1 Part, 4th *Consid.*

they to be practis'd after the Abolishment of it? Or what will he say to the Case of the King against *Darby*, which was an Information exhibited against the Defendant, being an Attorney of the Common-Pleas, for *defamatory Words* only of Sir *John Kay* a Justice of Peace concerning the Exercise of his Office? The Words were, as they are set forth in *Comb.* 65. *Sir John Kay is a Buffle-headed Fellow*, (a pretty Thing to be proved in Court!) *understands not Law, and is not fit to discourse it with me; he hath not done Justice to my Client.* There it was argued for the Defendant on a Demurrer, (and I chuse to recite it because of the Concessions of his Council against our Northern Advocate,) ' That an Information would not lie ' for scandalous Words spoken only of a ' particular Person, because he might ' have an Action on the Case to recompence him in Damages. — 'Tis true, ' such a Proceeding might be warranted for ' Libels, or for dispersing defamatory Letters, because by such Means the publick ' Peace might be disturbed, and Discords ' fomented amongst Neighbours, which ' might at last be a publick Injury: But ' there is no such Thing alledged in this ' Case, only Words in common Discourse, ' for which an Action on the Case might lie, but no Information. On the other ' Side it was insisted, That this Information ' was founded on sufficient Matter, because the Prosecution is not only as it respects the Person of Sir *John Kay*, but it ' relates to him as he is a publick Magistrate, ' and who is subordinate to the Government, ' and therefore such defamatory Words are ' a Reproach to the supreme Governor, by ' whom Magistrates are intrusted, and ' from whom they derive their Authority; ' and it will not be deny'd, but that Words ' reflecting on the publick Government are ' punishable at the Suit of the King by an ' Information. — And for this reason the ' Court held that an Information would lie, and thereupon gave Judgment against the Defendant, and fined him an ' Hundred Marks. *Carth.* 14, 15.

Mr.

Mr. Hamilton, who would seem to be more knowing than his Neighbours in many Things, affects to be more ignorant than every body, of what constitutes a Libel; and therefore altho' he pretends freely to acknowledge there are such Things as Libels, yet he insists at the same Time that what his Client is charged with, is not one; and if it be not, I will as freely acknowledge there can be no such Thing. He desires the Attorney-General to favour them with some Standard Definition of a Libel, by which it may be certainly known whether a Writing be a Libel, yea or not. And what is this for? Why truly to shorten the Dispute. But what Dispute does he speak of? The only Point that could admit of Dispute had been given up before by his confessing the Matters in Issue, and the Prosecutors Witnesses being thereupon discharged. As to what he requires, either there was such a Definition to be met with in the Books, or there was not; if there was, he ought to have known it; if there was not, why should he desire Mr. Attorney to favour him with one? Yet after he had been indulged beyond measure, and a Definition was produced from a good Author, who besides refers to several others that are unquestionable, all which conclude against his Client; is this loquacious Advocate contented? No. There are two Words to that bargain, as he had said before. He makes it a Foundation for further Disputes, and according to his wonted Ingenuity and Candour throughout his Reverie calls the concurrent Sense of our Books, Mr. Attorney's Rule, and Mr. Attorney's Doctrine.

But what certain Standard-Rule, quoth he, have the Books laid down, by which we can certainly know whether the Words are malicious? Whether they are defamatory? Whether they tend to a Breach of the Peace? and are a sufficient Ground to provoke a Man, his Family or Friends to Acts of Revenge? &c. Now these Queries methinks do not so well become the Mouth of an Advocate, as they might that of his Client when abandoned to his own Defence in a desperate Cause. But I answer, no Rules certainly can be of

Use to those who are determined to act without any, or in Opposition to all Rules, in which Class our Northern Barrister must be placed, if we are to frame a Judgment of him from the Share he bore in this Trial. The Rule laid down in our Books concerning Libels (I speak of Libels in the strict Sense according to the Definition of Mr. Serjeant Hawkins referred to in the Trial, and which alone concerns the present Case) is founded on the Reason of the thing; and is the same which is to be observed in other Matters that depend upon the Construction of Words and Writings, which are Signs only, or Images of Ideas intended to be conveyed to the Understandings of the Reader. There may indeed, be divers Rules applied according to the Circumstances of the Case; and this among the rest, that where Words are capable of two Senses, the one faulty, the other innocent; the latter is to be taken, provided such a Construction may be made without violence to their natural Import and Meaning. From whence it will follow, that the same Cases may happen that are doubtful, and do not come under any Standard-Rule, on all which Occasions honest and upright Judges will incline to the favourable side: There may be others again so clear and evident, that a Man must resign his Reason, or resolve to sacrifice his Conscience that does not discern, or will not allow them to be Libellous. But in none of these Cases can it come properly to be a Question before the Jury, whether a Libel or not, on the Plea of not Guilty, tho' it might afterwards be so, before the Court in Arrest of Judgment. By what has been said, there appears to be Latitude enough for a skilful Pen, (who notwithstanding must do it at his Peril) to lash publick and private Vices, to caution the People against Measures that may be hurtful to them, or to remonstrate against the evil Practices even of those in Power, without being always exposed to the Penalties of the Law. Such a Liberty of Writing and Printing, under due Restrictions, I own Englishmen ought not, and I hope never will be deprived of; and where this is dextrously done, it would be ridiculous for private

Persons to put the Cap on their own Heads, and no less impolitick for those in high Stations to apply every thing to their Administration. When such a Work is undertaken by able Hands, and with a generous View of serving the Publick, it is always laudable, and often very useful; but to succeed herein, requires a Capacity and Talents not to be discovered in Mr. Zenger's News-Papers, or his Council's Speech.

I perceive my Letter is unawares run to a great Length, by the Quotations that are interspers'd, and which yet I am sensible is the least Exceptionable part of it. I shall therefore take notice but of one thing more in this matchless Harangue, which indeed ought not to be forgot because it is made the Basis and Foundation of the whole; and that is concerning the *Right of Freeman to complain when they are hurt*. This our Lawyer often asserts in general Terms, with some Variation only of the Expression. As to which, I wou'd ask whether by it he means a Right to remonstrate and complain in a Legal way, or a Right in all Cases to appeal to the People by seditious and scandalous Libels? If the former, no body ever deny'd it, and what he said was not *ad idem*; so that he was fighting with the Air, and quarrelling without an Adversary: If the latter, he dishonour'd his Gown by advancing what is notoriously repugnant to all Laws human and divine. It was rul'd in the Court of B. R. Trin. 16 Car. That altho' a Bill be prefer'd in the Star-Chamber against a Judge for Corruption, or any other for any great Misdemeanor, yet if the Plaintiff will tell the Effect of his Bill in a Tavern, or any open Place, and by that means scandalize the Defendant, the same is punishable in another Court. *March Rep.* 76, 77. So in the Case of *Hole and Mellers*, 28 *Eliz.* in C. B. it was said by the Court, that altho' the Queen is the Head and Fountain of Justice, and therefore it is lawful for all her Subjects to resort unto her *ad faciendam Querimoniam*, yet if a Subject, after the Bill once exhibited, will divulge the Matter therein comprehended, to the Disgrace and Discredit of the Person intended, it is good Cause of Action, 3 *Leon.* 138. And to the

same Purpose, in a much later Case, *viz.* that of *Lake and King*, reported in many of our Books, to which Mr. Serjeant *Hawkins* refers, it seems agreed, as he observes, that whoever delivers a Paper full of Reflections on any Person in Nature of a Petition to a Committee of Parliament, to any other Person except the Members of Parliament, may be punished as the Publisher of a Libel, in respect of such a dispersing thereof among those who have nothing to do with it. 1 *Hawk. Chap.* 74. *Sect.* 12.

But our forward Barrister, *aged and infirm* as he represents himself (which compar'd with his Conduct is the keenest Satyr that could be suggested of him) ought to be further instructed, that even where Complaints are to the King himself, they must be made in a proper and regular Manner, a Decency is to be observ'd, and a Regard always had to the Characters, and Stations of the Persons against whom such Complaints are made. In 13 R. II. *Rot. Parliament.* No. 45, the Commons desir'd they might not be troubled for any Matter that should be contained in Petitions to the King; and the King answer'd, let every Man complain, so it be with Law and Reason. *It is lawful therefore*, no doubt, as it has been resolv'd, for any Subject to petition to the King for Redress, in an humble and modest Manner, where he finds himself aggrieved by a Sentence or Judgment; for Access to the Sovereign must not be shut up in Case of the Subjects Distresses. But on the other side, it is not permitted under Colour of a Petition and Refuge to the King, to rail upon the Judge or his Sentence, and to make himself Judge in his own Cause by prejudging it before a Rebearing. *Hob.* 220. Yet Sir Rowland Flaxing was committed and deeply fined for reporting to the King, that he could have no Indifferency before the Lords of the Council. 7 *Feb.* 18 *Hen.* 8. So likewise in the Time of *Hen.* 7. Sir Richard Terrets was committed, fined, sent to the Pillory, and adjudged to lose both his Ears, for his slanderous Complaint exhibited to the King in a written Book against the Chief Justice *Fitz-James*. Which Cases are cited by Chief Justice *Montague*, in

in the Case of *Wraynham*, (who was severely punished for an Offence of the same Nature) as reported in the Collections relating to the Life of Lord *Verulam*, P. 22. To these may be added, *Jeffe's Case* in the King's-Bench, *Mich. 5 Car.* *Jeffe* was indicted, for exhibiting an infamous Libel directed to the King against Sir *Edward Coke*, late Chief Justice of the King's-Bench, and against the said Court, for a Judgment given in the said Court in the Case of *Magdalen-College*, affirming the said Judgment to be Treason, and calling him therein Traitor, perjurd Judge, and scandalizing all the Professors of the Law. He fixed this Libel upon the great Gate at the Entrance of *Westminster-Hall*, and in divers other Places; and being hereupon arraigned, prayed that Counsel might be assign'd him, which was granted; and he had them, but would not be ruled to plead as they advised, but put in a scandalous Plea; and insisting upon it, affirmed he would not plead otherwise. Whereupon it was adjudged he should be committed to the Marsh, and that he should stand upon the Pillory at *Westminster* and *Cheapside*, with a Paper mentioning the Offence, and with such a Paper be brought to all the Courts of *Westminster*, and be continued in Prison, until he made his Submission in every Court, and that he should be bound with Sureties to be of good Behaviour during his Life, and pay a thousand Pounds Fine to the King. *Cro. Car.* 175, 6.

What now shall we say, or what must be thought of one who, while he pretends to great Reading and a thorow Knowledge of these Things, could yet in the Face of a Court, and in Defiance of its Authority, and indeed of all Authority, presume to justify the Publication of the most audacious Libels against that very Government under which he was breathing the Sedition! A Person, who, as a Counsellor at Law, boasting at the same time of having seen the Practice in very great Courts, would dare to call such Publication, address'd to the People, *The just Complaints of a Number of Men who suffer under a bad Administration!* Some of the Words charged in the

Information, and which Mr. *Hamilton* offer'd to prove, are, *That the Law was at an end.* I can't tell what Proof he had to give of this Fact, but surely if his Doctrine were to prevail, it must soon be the Case; and for my own Part, I will confess, I have not hitherto heard of any Thing in that Province, which look'd so much like it, as that such a Behaviour should not only go unpunish'd, but be attended with publick Munificence and Applause. The Truth is, this Gentleman, tho' stil'd a Barrister at Law in the Order of the Common Council of the City of *New-York*, and which Title therefore I have likewise given him, seems notwithstanding, instead of maintaining that Character, in the Trial before us, to be rather possess'd with a Fit of *Knight Errantry*, and to have sall'y'd out from *Philadelphia* to the other Province, with a full Resolution to encounter every thing that was Law, and to level all to the Ground that stood in his Way.—Let the Reader then be Judge upon the whole, whether he comes within the Description of that *mischievous Animal* I mentioned towards the Beginning of these Sheets.

After all, I flatter my self it will not be imagined, that I was stimulated to these hasty Animadversions by a Principle of Envy to Mr. *Hamilton*, or any Disrespect to those who were pleased to patronize his Performance, since they are utter Strangers to me, and probably will ever remain so. On the contrary, they may believe me, when I declare, that if the one had really merited what the others were of Opinion he did, I should with much more Pleasure have signify'd my Approbation of the Conduct of both, than I now take in shewing my Dislike. 'Tis on this score, Sir, that I cannot conclude, without publickly returning my Share of the Thanks that are due from the Fraternity to your Friend, the polite Author of the former Letter, who has done Justice to the Bar by his Remarks, which in my humble Apprehension, are worthy of any Gentleman at it, either here or elsewhere.

I am Yours, &c.

INDUS BRITANNICUS.

